92-1681

No. _____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EUGENE ANTHONY ALTMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: April 14, 1993

QUESTION PRESENTED

1. Whether the use of the Assimilative Crimes Act, 18 U.S.C. § 13, to increase the punishment for generic conduct already proscribed by federal law was improper and contrary to the opinions of this Court in Williams v. United States, 327 U.S. 711 (1946), and other Circuit Courts of Appeal?

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

No. _____

EUGENE ANTHONY ALTMAN

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Eugene Anthony Altman, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on January 15, 1993.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on January 15, 1993 is reproduced in the Petitioner's Appendix hereto at Pet. App. at 1.

The Order and Opinion of the United States District Court, Eastern District of California denying the Petitioner's Motion to Vacate Guilty Plea and Sentence pursuant to 28 U.S.C. § 2255 was entered on January 16, 1992. See Pet. App. at 10.

The Opinion of the United States Court of Appeals for the Ninth Circuit on the Petitioner's direct appeal following conviction was entered on May 2, 1991. See Pet. App. at 12. The Order denying the Petition For Rehearing and Suggestion For Rehearing En Banc was entered on July 3, 1991. See Pet. App. at 17.

The Order of the United States District

Court, Eastern District of California denying the Petitioner's Motion to Restrict Classification of Offense and Maximum Penalty in which the Petitioner argued that the district court lacked jurisdiction to try or to sentence him under 18 U.S.C. § 13 was entered on May 15, 1990. See Pet. App. at 19.

JURISDICTION

The Opinion of the Court of Appeals for the Ninth Circuit was filed on January 15, 1993. See Pet. App. at 1. The jurisdiction of this Court to review the judgment of the Ninth Circuit is conferred under 28 U.S.C. Section 1254(1).

APPLICABLE CONSTITUTIONAL & STATUTORY PROVISIONS

18 U.S.C. § 13

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this

title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(b) For purposes of subsection (a) of this section, that which may or shall be imposed through jurisdiction or administrative action under the law of a State, territory, possession, or district, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law. Any limitation on the right or privilege to operate a motor vehicle imposed under this

subsection shall apply only to the special maritime and territorial jurisdiction of the United States.

STATEMENT OF THE CASE

While driving in Sequoia National Park on a vacation, Petitioner Altman's rental car struck another car. The Petitioner's vehicle was traveling at about 38 miles per hour at the time of the collision. The passenger in the Petitioner's car, two passengers in the other car and the Petitioner himself were injured although no permanent or serious injuries were sustained. At the time of the automobile accident, the Petitioner was a 42 year old man who had been continuously employed by Eastern Airlines as a flight attendant for 18 years. He had no criminal record. Moreover, in the 26 years that the Petitioner had been driving, he had never had an incident involving alcohol or drug

abuse nor had he ever had his license suspended or revoked.

On July 13, 1989, the Petitioner was indicted by a federal grand jury for the Eastern District of California and charged with (1) driving in Sequoia National Park while under the influence of alcohol causing bodily injury to others in violation of the California DUI with Enhancements Statute, California Vehicle Code Sections 23153(a) and 23182 and the Assimilative Crimes Act, 18 U.S.C. Section 13(a) (Count I), and (2) driving in Sequoia National Park while having .10% or more of alcohol in his blood causing bodily injury in violation of California Vehicle Code Sections 23153(b) and 23182 and the Assimilative Crimes Act, 18 U.S.C. § 13(a)(Count II).

Following the Indictment by the federal grand jury, the Petitioner plead guilty to Count I of the Indictment, driving a vehicle

under the influence of alcohol resulting in bodily injury, in violation of the California DUI with Enhancements Statute, Cal. Veh. Code § 23153(a), incorporated into federal law via the Assimilative Crimes Act, 18 U.S.C. § 13(a).

Subsequently, the Petitioner filed a "Motion to Restrict Classification of Offense and Maximum Penalty" arguing that the district court lacked jurisdiction to try or to sentence him under the Assimilative Crimes Act, 18 U.S.C. § 13(a), because the generic conduct for which he was indicted was proscribed by Federal Regulation 36 C.F.R. § 4.23 which prohibits the operation of a motor vehicle in a national park while under the influence of alcohol. The district court denied the Petitioner's motion. See Pet. App. at 19.

On May 21, 1990, the district court sentenced the Petitioner, a first offender,

to a term of imprisonment of nine months to be followed by a three year period of supervised release. The Petitioner timely filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.

On direct appeal to the United States Court of Appeals for the Ninth Circuit, the Petitioner argued that the district court did not have jurisdiction to try or to sentence him under 18 U.S.C. Section 13, the Federal Assimilative Crimes Act. On May 2, 1991, the Ninth Circuit affirmed the Petitioner's conviction. See Pet. App. at 12. The Order denying the Petition for Rehearing and Suggestion For Rehearing En Banc was entered on July 3, 1991. See Pet. App. at 17.

On or about November 20, 1991, the Petitioner filed a Motion to Vacate Guilty Plea and Sentence pursuant to 28 U.S.C. §

2255 before the District Court for the Eastern District of California on the ground that the district court did not have jurisdiction to try and to sentence him under 18 U.S.C. § 13 (Assimilative Crimes Act) in view of the fact that the generic conduct for which he was convicted is proscribed by Federal Regulation 36 C.F.R. § 4.23.

On or about January 16, 1992, the district court entered an Order denying the Petitioner's Motion to Vacate Guilty Plea and Sentence. See Pet. App. at 10.

On January 15, 1993, a panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court's Order with one judge dissenting. See Pet. App. at 1.

REASONS FOR GRANTING THE WRIT

In the Petitioner's Motion to Vacate Guilty Plea and Sentence Pursuant to 28 U.S.C. § 2255 filed before the District Court for the Eastern District of California and in his appeal to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 2255, the Petitioner raised one issue - whether the district court had jurisdiction to try and to sentence him under the Assimilative Crimes Act, 18 U.S.C. § 13, in view of the fact that the generic conduct for which he was indicted is prohibited under Federal Regulation 36 C.F.R. § 4.23. In determining whether the district court had jurisdiction under the Assimilative Crimes Act, it is important to understand the relevant state and federal laws.

California Vehicle Code Section 23153(a) punishes driving while intoxicated

causing bodily injury to another. The punishment for a violation of section 23153(a) is imprisonment up to one year and a fine of up to $1000.00. Cal.Veh.Code § 23180.

Pursuant to its authority under 16 U.S.C. § 3, the National Park Service has promulgated federal regulations governing vehicular traffic in the Nation's parks. The regulations incorporate all state traffic and vehicle laws except those "specifically addressed" in the regulations. See 36 C.F.R. § 4.2.

36 C.F.R. § 4.23 specifically addresses the drunk driving law for national parks. The regulation provides in pertinent part:

> (a) Operating...a motor vehicle is prohibited while:
>
> (1) Under the influence of alcohol...or
>
> (2) The alcohol concentration in the operator's blood or breath is 0.10 grams...Provided however, that if State law that applies to operating a motor

> vehicle while under the influence of alcohol establishes more restrictive limits of alcohol concentration in the operator's blood or breath, those limits supersede the limits specified in this paragraph.

The penalty for violating the National Park drunk driving regulation is a maximum of six months incarceration and a $500.00 fine. 36 C.F.R. § 1.3(a).

In the case sub judice, the government prosecuted the Petitioner under the California law applicable to drunk driving offenders who cause bodily injury, via the Assimilative Crimes Act, rather than under the National Park drunk driving regulation. The Assimilative Crimes Act provides, inter alia:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title [defining the special maritime and territorial jurisdiction of the United States], is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted

> within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 13(a) (emphasis added).

California Vehicle Code Section 23153(a), for which the Petitioner was convicted, and Federal Regulation 36 C.F.R. § 4.23 proscribe the same generic conduct. The generic conduct proscribed by California Vehicle Code Section 23153(a), which punishes drunk driving causing bodily injury, is drunk driving. As recognized by the California Supreme Court in Wilkoff v. Superior Court, 696 P.2d 134, 137 (Cal. 1985), the "bodily injury element" of California Vehicle Code Section 23153 is not part of the 'conduct' which is prohibited by the statute but rather, the bodily injury element "is only of materiality in that it aggravates the offense from a misdemeanor to

a felony".

> The act prohibited by section 23153 (of the California Vehicle Code) is defined in terms of an actus of driving: the driving of a vehicle while intoxicated and, when so driving, violating any law relating to the driving of a vehicle. The acts reus of the offense does not include causing bodily injury. Rather, where bodily injury proximately results from the prohibited act, the offense is elevated from a misdemeanor to a felony.

696 P.2d at 139 (emphasis added).

Thus, the conduct being punished by Section 23153 is drunk driving and the "bodily injury" aspect of Section 23153 merely exists to increase the punishment for that act. Indeed, in the Ninth Circuit's Memorandum Opinion on the Petitioner's appeal of his section 2255 motion to vacate, Judge Rymer's dissenting opinion notes, "that Wilkoff mandates the conclusion that drunk driving which results in injury is precisely the same conduct as drunk driving." See Pet. App. at 8. Thus,

California Vehicle Code Section 23153(a) and Federal Regulation 36 C.F.R. § 4.23 proscribe the same generic conduct - drunk driving.[1] See United States v. Palmer, 956 F.2d 189 (9th Cir. 1992) (the "gravamen" of National Park Regulation 36 C.F.R. § 4.23 is drunk driving and, thus, where a defendant was arrested in a California National Park for drunk driving, the federal government could not use the Assimilative Crimes Act to prosecute the defendant under a California law punishing repeat drunk driving

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[1] While it is true that California Vehicle Code Section 23153 punishes "driving a vehicle while intoxicated and, when so driving, violating any law relating to the driving of a vehicle," Wilkoff v. Superior Court, 696 P.2d 134, 137 (Cal. 1985), it is not necessary to prove that any specific law was violated, only that a defendant negligently operated a motor vehicle while driving drunk. People v. Oyaas, 173 Ca.3d 664, 219 Cal.Rptr. 243(1985). The gravamen of Section 23153 is, thus, drunk driving. The "gravamen" of National Park Regulation 36 C.F.R. § 4.23 is the same. See United States v. Palmer, 956 F.2d 189 (9th Cir. 1992).

offenders).

Yet, in the Ninth Circuit's Memorandum Opinion on the Petitioner's appeal of his section 2255 motion to vacate, the majority refused to consider the Petitioner's claim noting that 36 C.F.R. § 4.23 does not address the precise act of drunk driving which results in injury. See Pet. App. at 1.

This decision of the Ninth Circuit conflicts with both United States Supreme Court and Court of Appeals' decisions which hold that, in determining whether the Assimilative Crimes Act is applicable, courts are not to be concerned with whether the "precise conduct" has been made penal by federal law, but with whether the generic conduct in question has been made penal. See Williams v. United States, 327 U.S. 711 (1946); United States v. Butler, 541 F.2d 730 (8th Cir. 1976); Shirley v. United

States, 554 F.2d 767, 769 (6th Cir. 1977).

In Williams v. United States, 327 U.S. 711 (1946), this Court recognized that the Assimilative Crimes Act permits the application of state law where a defendant does "any act or thing which is not made penal by any laws of Congress." Id. at 712. The Court, however, held that this language should not be interpreted as requiring the courts to look to see whether the "specific" acts of the parties are covered by federal law. Rather, this language is to be interpreted "in a generic sense referring to acts of a general type or kind" which have been made penal by any laws of Congress. 327 U.S. at 722. Thus, in Williams, this Court held that where a federal statute or regulation has prohibited a criminal act of a general type or kind, the Assimilative Crimes Act cannot be used to assimilate state law in place of the federal statute or

regulation.[2]

Similarly, in United States v. Butler, 541 F.2d 730 (8th Cir. 1976) the United States Court of Appeals for the Eighth Circuit, in reversing the application of the Assimilative Crimes Act to a defendant, held that Williams requires Courts to apply federal law rather than state law if the

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[2] In Williams, Defendant Williams was convicted for raping an Indian woman on an Indian reservation. Utilizing the Assimilative Crimes Act, Williams was prosecuted under the Arizona statutory rape statute. The Supreme Court found that the Arizona statutory rape statute, which expanded the scope and punishment of the federal statutory rape statute could not be applied to Williams under the Assimilative Crimes Act. The Arizona statutory rape statute expanded the scope of the federal offense by defining statutory rape as applying to any female under age 18 as opposed to the federal statute which applied to rape of any female under age 16. In addition, the Arizona statutory rape statute increased the maximum punishment by permitting a life sentence while the federal statute only permitted a sentence of 15 years for the first offense and not more than 30 years for a subsequent offense.

federal law punishes the generic conduct in question. As explained by the Court in Butler, quoting in part from Williams, 541 F.2d at 735-36 (footnote omitted; emphasis in text):

> The analysis in Williams demonstrates that the Court was primarily concerned not with whether the precise acts had been made penal, but with the discernment of the intent of Congress to punish the generic conduct in question. The Court [in Williams] observed:
>
> > As to the particular offense involved in this case, the legislative history shows an increasing purpose by Congress to cover rape and all related offenses fully with penal legislation... Congress repeatedly has increased its list of specific prohibitions of related offenses and has enlarged the areas within which those prohibitions are applicable. It has covered the field with uniform federal legislation affecting areas within the jurisdiction of Congress.
>
> Id. at 724, 66 S.Ct. at 784.
>
> More definitely the [Williams] Court referred to the legislative history of the ACA:
>
> > The word "offense" was changed so as to avoid the use of it as referring

> to an action which had not been prohibited and, therefore, technically could not be an "offense." Possibly this change of the old phrase into the phrase "any act or thing which is not made penal by any laws of Congress" led to the present attempt to interpret it in a specific sense as referring to individual acts of the parties rather than in a generic sense referring to acts of a generic type of kind. The new words, in the light of the Congressional Committee's explanation of them, cannot, however, be regarded as changing the scope of the Act so substantially as to make it amend and enlarge the definition of an existing federal offense as well as to cover the case where an "offense" had not been prohibited. To do so would be contrary to the expressed purpose of the Committee to continue, rather than to change, its original meaning. In the instant case not only has the generic act been covered by the definition of having carnal knowledge, but the specific acts have been made "penal" by the definition of adultery.

Id. at 722-23, 66 S.Ct. at 784 (emphasis added).

Upon determining that Congress had intended to proscribe the generic conduct the [Williams] Court held that the state law could not be used to expand or restrict the scope of the federal law:

> The fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the State, does not mean that the congressional definition must give way to the State definition ... The interesting legislative history of the Assimilative Crimes Act discloses nothing to indicate that, after Congress has once defined a penal offense, it has authorized such definition to be enlarged by the application to it of a state's definition of it. It has not even been suggested that a conflicting state definition could give a narrower scope to the offense than that given to it by Congress. We believe that, similarly, a conflicting State definition does not enlarge the scope of the offense defined by Congress. The Assimililative Crimes Act has a natural place to fill through its supplementation of the Federal Criminal Code, without giving it the added effect of modifying or repealing existing provisions of the Federal Code.

Id. at 717-18, 66 S.Ct. at 781-82.

In the case sub judice, the Ninth Circuit Court of Appeals erred in holding that the California Vehicle Code requires an additional element not found in the federal

regulation -- injury to another -- and that, consequently, the California Vehicle Code should apply under the Assimilative Crimes Act. As recognized by the Eighth Circuit in Butler, 541 F.2d at 737 (emphasis in text), Williams holds:

> The test [for determining whether the Assimilative Crimes Act makes State law applicable] is not whether the same elements of proof are contained in both State and federal statutes, but whether the acts of the defendant are made punishable under any enactment of Congress. As Williams makes clear, "acts" under the ACA does not refer to "individual acts of the parties" but, rather, in a "generic sense" to acts of a general type or kind which are prohibited.

See also Shirley v. United States, 554 F.2d 767, 769 (6th Cir. 1977) (error for prosecution to use the Assimilative Crimes Act to incorporate Tennessee's state robbery statute which provided enhanced punishment for robberies committed with use of a deadly weapon rather than charging a violation of the federal robbery statute which provided

no distinction between simple and armed robbery).

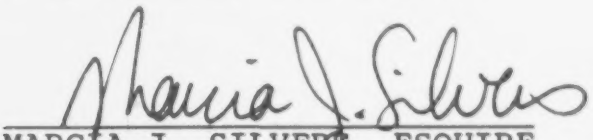
In sum, the decision of the Ninth Circuit Court of Appeals clearly conflicts with this Court's decision in Williams, supra which prohibits the use of the Assimilative Crimes Act where the generic conduct of the party has been made punishable by federal law. Futhermore, there is a need for the Assimilative Crimes Act to be applied with national uniformity so that crimes committed on federal enclaves will be treated the same whether they occur in the jurisdiction of one federal court of appeals or another. Pursuant to the decision of the Ninth Circuit Court of Appeals, the Assimilative Crimes Act will be applied to those who commit crimes on federal enclaves within the jurisdiction of the Ninth Circuit whenever their "precise acts" have not been made penal by federal

law. In contrast, under the Eighth Circuit's decision in Butler, supra, and the Sixth Circuit's decision in Shirley, supra, the Assimilative Crimes Act will be applied to those who commit crimes on federal enclaves within the jurisdiction of the Eighth and Sixth Circuits only where the "generic conduct" has not been made penal by federal law. This disparity in the application of a national statute must be resolved.

CONCLUSION

For all of the foregoing reasons, therefore, the Petitioner respectfully submit that this Court should grant this Petition for Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this 14th day of April, 1993 to JOHN B. CONKLIN, Assistant United States Attorney, 4304 Federal Building, 1130 "O" Street, Fresno, California 93701.

By: Marcia J. Silvers
MARCIA J. SILVERS

APPENDIX

EUGENE A. ALTMAN

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 92-15160

United States Court of Appeals
Ninth Circuit

January 15, 1993

Appeal from the United States District Court for the Eastern District of California.

Before GOODWIN, O'SCANNLAIN, and RYMER, Circuit Judges.

While on vacation in Sequoia National Park, Altman drove his rented Cadillac across the center lane and struck another

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R.36-3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed.R.App. P.34(a), Ninth Circuit R. 34-4.

car. Four people were injured as a result of the collision: a passenger in Altman's car, two passengers in the other car, and Altman himself.

Following an indictment by a federal grand jury, Altman pleaded guilty to one count of causing bodily injury while driving a vehicle under the influence of alcohol in violation of Cal. Veh. Code § 23153(a) incorporated into federal law via the Assimilative Crimes Act, 18 U.S.C. § 13(a). Subsequently, the district court denied his "motion to restrict classification of offense and maximum penalty."

Altman appealed, arguing that the California statute could not be assimilated because a federal regulation, 36 C.F.R. § 4.23, prohibits the same conduct. A panel of this court affirmed his conviction, holding that because "Congress has neither

proscribed the specific acts committed by [this defendant] nor the generic conduct in which [he] engaged in such a way as to indicate an intent to '[cover] the field with uniform federal legislation,'" it was proper for the district court to use the Assimilative Crimes Act to incorporate Cal. Veh. Code § 23153(a). United States v. Altman, No.90-10291 (May 2, 1991) (per curiam) (quoting United States v. Smith, 574 F.2d 988, 990 (9th Cir.), cert. denied, 439 U.S. 852 (1978).

Altman then filed a section 2255 motion to vacate. The district court denied his motion, citing this court's decision on the direct appeal. This appeal followed.

Altman contends that the district court did not have jurisdiction under the Assimilative Crimes Act because the precise conduct prohibited by Cal. Veh. Code §

23153(a) is made penal by 36 C.F.R. § 4.23, leaving "no gap in federal law for the state statute to fill." See United States v. Kaufman, 862 F.2d 236, 237 (9th Cir. 1989) (per curiam). However, on direct appeal, this court explicitly held that 36 C.F.R. § 4.23 "does not address the generic conduct, or the precise act, or drunk driving which results in injury." The government asserts that the earlier decision on appeal established the law of the case. However, a habeas action is a separate civil action to which the law of the case doctrine has no applicability. Similarly, the inapplicability of res judicata to habeas is "inherent in the very role and function of the writ" because "conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."

Sanders v. United States, 373 U.S. 1, 8 (1963).

"Nevertheless, when a federal prisoner presents a claim in a § 2255 petition that he has presented previously, the federal court retains the discretion to refuse to consider the claim on the basis that the prisoner is abusing the writ." Walter v. United States, 969 F.2d 814, 816 (9th Cir. 1992) (considering the effect on postconviction relief of rejection of same claim on direct appeal). We may refuse to entertain Altman's petition absent a showing of manifest injustice or a change in the law. Polizzi v. United States, 550 F.2d 1133, 1135 (9th Cir. 1976). Altman does not argue that his sentence was manifestly injust; rather he contends that this court's decision in United States v. Palmer, 956 F.2d 189 (9th Cir. 1992), rendered

subsequent to his direct appeal, is controlling authority to the contrary.

However, nothing in Palmer itself says that "drunk driving which results in injury" is not more specific conduct than "drunk driving." Rather, the defendant in that case was convicted under Cal. Veh. Code § 23152 which, by its own terms, prohibits exactly the same conduct as 36 C.F.R. § 4.23 -- drunk driving -- and no more. Altman pleaded guilty to drunk driving resulting in injury in a violation of section 23153(a), a section of the California Vehicle Code which has no parallel federal regulation. We indicated in Palmer that if California had made the specific conduct at issue in that case a district crime, as California has done in section 23153(a) in this case, the Assimilative Crimes Act might be properly invoked. See id. at 191.

In fact, the centerpiece of Altman's attack on his conviction is not Palmer but Wilkoff v. Superior Court, 696 P.2d 134, 139 (Cal. 1985). However, Wilkoff was decided by the California Supreme Court in 1985. Altman has already had the opportunity to persuade both the district court and this court that Wilkoff mandates the conclusion that "drunk driving which results in injury" is precisely the same conduct as "drunk driving" but has failed to do so.

Altman has not demonstrated that Palmer represents a change in the law. To the contrary, Palmer merely reaffirms the principle, first espoused by the Supreme Court in 1946, that "Congress did not intend that the Assimilative Crimes Act serve as a vehicle under which a state statute affixing punishment. . . could lessen or enlarge a federal penal offense." William v. United

States, 327 U.S. 711, 718-22 (1946). Moreover, Altman has failed to demonstrate manifest injustice. Thus, we exercise our discretion to refuse to revisit an issue that we have already addressed on direct appeal.

AFFIRMED

RYMER, Circuit Judge, dissenting:

I part company with my colleagues because I cannot distinguish Wilkoff v. Superior Court, 696 P.2d 134 (Cal. 1985) in light of United States v. Palmer, 956 F.2d 189 (9th Cir. 1992). In Palmer we said that state law could not be assimilated to increase the punishment for an act proscribed by federal law. Id. at 191. The California Supreme Court held in Wilkoff that the only significance of bodily injury is to aggravate the offense from a misdemeanor to a felony. 696 P.2d at 139. Because Wilkoff did not become significant until Palmer separated state law determining intoxication from state law regarding punishment, I cannot agree that it matters whether Altman has failed to convince a federal court before "that Wilkoff mandates the conclusion that 'drunk driving which

results in injury' is precisely the same conduct as 'drunk driving.'" I therefore dissent.

UNITED STATES OF AMERICA,

Plaintiff,

v.

EUGENE ANTHONY ALTMAN,

Defendant.

No.CRF-89-142-EDP

United States District Court for
the Eastern District of California

January 16, 1992

Before EDWARD DEAN PRICE, Senior
United States District Judge

The above named defendant has filed a motion under 28 U.S.C. § 2255 to vacate his guilty plea. He has also filed motions for release pending the Court's decision in this matter.

The defendant raises the same issue that he raised before the Ninth Circuit Court of Appeals. In affirming his sentence, which was enhanced pursuant to 18 U.S.C. § 13(a), California Vehicle Code §

23153(a), the Ninth Circuit panel stated:

> Appellant argues that federal law 36 C.F.R. § 4.23 proscribes the same general conduct--here driving while under the influence of alcohol--as the state statute for which he was convicted, and therefore the California statute was improperly assimilated under the ACA by the district court. However, appellant's conduct was not merely "drunk driving," but "drunk driving which resulted in injury," conduct not proscribed by the federal statute. Therefore, we affirm.

The appellate court pointed out that the Code of Federal Regulations only prohibits drunk driving generally; none of the federal regulations that would be involved in this case address the crime to which the defendant plead guilty, i.e., causing injury while driving drunk.

Defendant's motion to vacate his guilty plea and for release pending the Court's decision is denied.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EUGENE ANTHONY ALTMAN,

Defendant-Appellant.

No. 90-10291

United States Court of Appeals
Ninth Circuit

May 2, 1991

Appeal from the United States District Court for the Eastern District of California

Before D.W. NELSON, KOZINSKI, and T.G. NELSON, Circuit Judges.

Appellant Eugene Anthony Altman appeals his conviction under Ca. Veh. Code § 23153(a) pursuant to the Assimilative Crimes Act ("ACA"), 18 U.S.C. § 13(a). Appellant argues that federal law 36 C.F.R. § 4.23

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* This disposition is not appropriate for publication and may not be cited or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

proscribes the same general conduct -- here driving while under the influence of alcohol -- as the state statute for which he was convicted, and therefore the California statute was improperly assimilated under the ACA by the district court. However, appellant's conduct was not merely "drunk driving," but "drunk driving which resulted in injury," conduct not proscribed by the federal statute. Therefore, we affirm.

We are called upon to interpret the application of the ACA to appellant's operation of a motor vehicle while under the influence of alcohol, resulting in injury to three people other than appellant. In United States v. Kiliz, 694 F.2d 628 (9th Cir. 1982), this court described the purpose of the ACA as threefold:

> First, the ACA establishes a gap-filling criminal code for federal enclaves. Second, the ACA provides for

> conformity in the laws governing a federal enclave and the state in which an enclave in located. Third, the ACA should give the people within a federal enclave as much protection as is afforded to those outside of the enclave.

Id. at 629 (citation omitted).

The Supreme Court, in Williams v. United States, 327 U.S. 711 (1946), held that the ACA did not make an Arizona "statutory rape" law applicable to the defendant's conduct because:

> (1) the precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery and (2) the offense known to Arizona as that of "statutory rape" has been defined and prohibited by the Federal Criminal Code, and is not to be redefined and enlarged by application to it of the Assimilative Crimes Act.

Id. at 717 (footnotes omitted). And this court, in United States v. Kaufman, 862 F.2d 236 (9th Cir. 1989) (per curiam), stated, "A state criminal statute is not assimilated [] when the precise conduct it prohibits is

made penal by federal law -- there is then no gap in federal law for the state statute to fill." Id. at 237.

Appellant argues that the Eighth Circuit's interpretation of Williams in United States v. Butler, 541 F.2d 730 (8th Cir. 1976), supports his claim. Yet, as the Fifth Circuit noted in United States v. Brown, 608 F.2d 551 (5th Cir. 1979), "In Williams and Butler, state and federal laws proscribed the same offenses which were defined differently in state and federal statutes. Those decisions do not affect the rule permitting prosecution under the ACA only for state crimes which are not made penal by any law of Congress." Id. at 554 (citing Williams).

In the instant action federal law 36 C.F.R. § 4.23 proscribes driving while under the influence of alcohol. However, Ca.Veh.

Code § 23153(a), addressing the all-too-common results of such driving, proscribes driving while under the influence of alcohol which results in injury. The federal regulation does not address the generic conduct, or the precise act, of drunk driving which results in injury. "Congress has neither proscribed the specific acts committed by these defendants nor the generic conduct in which they engaged in such a way as to indicate an intent to '[cover] the field with uniform federal legislation ....'" United States v. Smith, 574 F.2d 988, 990 (9th Cir.) (quoting Williams, 327 U.S. at 724), cert. denied sub nom. Williams v. United States, 439 U.S. 852, and cert. denied sub nom. Komok v. United States, 439 U.S. 852 (1978).

Accordingly, we AFFIRM the district court's use of the ACA in incorporating Ca. Veh. Code § 23153(a).

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EUGENE ANTHONY ALTMAN,

Defendant-Appellant.

No. 90-10291

United States Court of Appeals
Ninth Circuit

Appeal from the United States
District Court for the Eastern
District of California

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

July 3, 1991

Before: D.W. NELSON, KOZINSKI and T.G. NELSON, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no

active judge has requested a vote on whether to rehear the matter en banc. (Fed.R.App.P. 35). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES OF AMERICA,

Plaintiff,

v.

EUGENE ANTHONY ALTMAN,

Defendant.

No.CRF-89-142-EDP

United States District Court for the Eastern District of California

Order dated May 15, 1990

Before EDWARD DEAN PRICE, Senior United States District Judge

On March 12, 1990, the above named defendant plead guilty to count one of the indictment presently pending against him. Count one of the indictment reads as follows:

1. The Grand Jury charges: T H A T

EUGENE ANTHONY ALTMAN

defendant herein, on or about May 4, 1989, in Sequoia National Park, within the Special Maritime and Territorial Jurisdiction of the United States, State and Eastern District of

> California, while under the influence of an acoholic beverage, knowingly and willfully did drive a vehicle, and in so driving, did acts forbidden by law and neglected duties imposed by law in the driving of the vehicle, by driving at a speed in excess of the posted speed limit in violation of California Vehicle Code Section 22348(a) and by driving within the left hand-lane of a two-lane, two-way road, in violation of California Vehicle Code Section 21650, which acts and neglect proximately caused bodily injury to Heather Bell Lema, a passenger is said vehicle, in violation of Title 18, United States Code, Section 13(a) and California Vehicle Code Section 23153(a).

Subsequent to the plea, defendant's counsel filed a motion requesting the Court to made a judicial declaration that the offense charged was misdemeanor as a matter of law.

Defendant argues that the purpose of the Assimilated Crimes Act, i.e., 18 U.S.C. § 13, is to assimilate state law in those areas where no federal law exists. Title 36 of the Code of Federal Regulations, section 4.23 provides as follows:

(a) Operating or being in actual physical control of a motor vehicle is prohibited while:

(1) Under the influence of alcohol, or a drug, or drugs, or any combination thereof, to a degree that renders the operator incapable of safe operation; or

(2) The alcohol concentration in the operator's blood or breath is 1.10 grams or more of alcohol per 100 milliliters of blood or 1.10 grams or more of alcohol per 210 liters of breath. Provided however, that is State law that applies to operating a motor vehicle while under the influence of alcohol establishes more restrictive limits of alcohol concentration in the operator's blood or breath, those limits supersede the limits specified in this paragraph.

(b) The provisions of paragraph (a) of this section also apply to an operator who is or has been legally entitled to use alcohol or another drug.

California Vehicle Code section 23152 that was in effect at the time of this offense provides in pertinent part as follows:[1]

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[1] Since it is not material to the issues presented to the Court, the Court expresses no opinion whether or not this section might also now be assimilated under

(...Continued)

> (a) It is unlawful for any person who is under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle.
>
> (b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

The elements of the offense in 36 C.F.R. section 4.23 and California Vehicle Code section 23152 are the same. They are, driving, operating or controlling a vehicle while under the influence of alcohol, under the influence of any drug, or under the combined influence of drugs and alcohol. California Vehicle Code section 23152 is not the section under which the defendant was charged, nor is it the section which the defendant entered his plea of guilty.

1(...Continued)
18 U.S.C. § 13(a), because of the different presumptions arising from the blood weight of alcohol.

California Vehicle Code section 23153(a), which was in effect at the time of the offense, and to which the defendant entered his plea, provides as follows:

> (a) It is unlawful for any person, while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle and, when so driving, do any act forbidden by law or neglect any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

This states an offense which is distinct from the offense stated in California Vehicle Code section 23152. The elements of this offense, other than driving under the influence of alcohol or drugs, or the combined influence of the same, requires the defendant to have committed a further offense prohibited by the statutes governing the operation of the vehicle. The further requirement is that the statute, which is

violated, proximately caused bodily injury to any person other than the driver.

Starting on page three, at line seven, of the transcript of the taking of the plea, the following occurred:

> Q. Are the following facts true? On May 4, 1989, you were driving in Sequoia National Park?
>
> A. Yes, Your Honor.
>
> Q. That you realize that is in the special territorial jurisdiction of the United States.
>
> A. Yes, sir.
>
> Q. And, that you were driving a car while under the influence of an alcoholic beverage?
>
> A. Yes, Your Honor.
>
> Q. And, in doing so, did you drive on the wrong side of the road?
>
> A. Yes, Your Honor.
>
> Q. And, did you drive in excess of the posted speed limit in that place?
>
> A. Yes, Your Honor.

Q. And, did you have a collision with a second car?

A. Yes, sir.

Q. And, did that collision result in injuries to Heather Bell Lema, a passenger in your car?

A. Yes, sir.

Q. And, as a result injuries to Julie Ann Worthington and Eric Krueger, passengers in the second car?

A. Yes, sir.

Section 23182 of the California Vehicle Code provides the punishment for a violation of California Vehicle Code section 23153. That section reads as follows:

> Any person who proximately causes bodily injury or death to more than one victim in any one instance of driving in violation of Section 23153 of this code or in violation of Section 191.5 or paragraph (3) of subdivision (c) of Section 192 of the Penal Code, shall, upon a felony conviction, receive an enhancement of one year in the state prison for each additional injured victim. The enhanced sentence provided for in this section shall not be imposed unless the fact of the bodily injury to each additional victim is charged in the accusatory pleading and

> admitted or found to be true by the trier of fact. The maximum number of one year enhancements which may be imposed pursuant to this section is three.
>
> Nothwithstanding any other provision of law, the court may strike the enhancements provided in this section if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment.

It is clear that the defendant plead to a crime separate from that set forth in the Code of Federal Regulations, and did so on a federal enclave, i.e., a national park. Further, it is clear from the defendant's plea that he admitted injuring more than one person.

Accordingly, the Court declines to declare the offense to which the defendant entered a plea as being a misdemeanor. Indeed, defendant plead guilty to a felony.